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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

PAUL PESQUEIRA,

Plaintiff and Respondent,

v.

CITY OF LOS ANGELES et al.,

Defendants and Appellants.

B218308

(Los Angeles County Super. Ct.
No. BS115721)

APPEAL from a judgment of the Superior Court of Los Angeles County. James C. Chalfant, Judge. Affirmed.

Carmen A. Trutanich, City Attorney, Carlos De La Guerra, Managing Assistant City Attorney, Wayne H. Song, Supervising Deputy City Attorney, and Bruce Monroe, Deputy City Attorney, for Defendants and Appellants.

Stone Busailah, Michael P. Stone and Marc J. Berger for Plaintiff and Respondent.

Defendants and appellants William Bratton (the Chief), in his official capacity as chief of police of the Los Angeles Police Department (LAPD), and the City of Los Angeles (collectively the City) appeal from a judgment granting a petition for a writ of mandate in favor of plaintiff and respondent Paul Pesqueira in this action concerning his demotion. The City contends: 1) the trial court should have applied traditional mandamus standards under Code of Civil Procedure section 1085,¹ rather than the standards applicable to administrative mandamus under section 1094.5, because Pesqueira was not entitled to a hearing under the circumstances of this case; 2) even under administrative mandamus standards, substantial evidence supported the administrative decision at issue; and 3) the trial court should have denied the writ petition based on Pesqueira's failure to file and serve a notice of motion. We conclude the independent judgment standard applies to Pesqueira's petition for a writ of mandate under section 1094.5, the trial court's findings are supported by substantial evidence, and the City failed to show any prejudice from the lack of a notice of motion. Therefore, we affirm.²

FACTS AND PROCEDURAL BACKGROUND

Pesqueira has served in the LAPD for more than 30 years. Effective March 31, 2003, he committed to retire within five years by enrolling in the LAPD's deferred retirement option program. In 2006, Pesqueira was served with four notices to correct deficiencies in his job performance and a special evaluation that showed substandard performance. He filed a grievance with the LAPD seeking withdrawal of the notices and evaluation.

¹ All further statutory references are to the Code of Civil Procedure, unless otherwise stated.

² The City's request that this court take judicial notice of provisions of the LAPD's Board of Rights Manual is granted.

In March 2007, the Chief served Pesqueira with a notice of demotion from Captain I to Lieutenant II for failure to perform his duties in a satisfactory manner. Pesqueira appealed the demotion to an administrative tribunal referred to as a board of rights. The board held a hearing on March 31, 2008, which Pesqueira attended with his attorney. The hearing ended during the cross-examination of an LAPD witness, which the parties intended to resume on the next hearing date. After discussing additional hearing dates, the parties agreed to April 14 and May 7, 8, 9, and 16, 2010. Pesqueira's attorney noted on the record that Pesqueira might not be available on one of the days due to a personal commitment with his wife, "but we will let the [LAPD] know as soon as we know so that we can notify the board members."

On April 7, 2008, Pesqueira notified the LAPD that he could not attend the April 14, 2010 hearing date due to a scheduling conflict and requested a continuance. On April 14, 2010, the board convened. Pesqueira's attorney appeared, but Pesqueira was not present. Pesqueira's attorney explained that Pesqueira had requested a continuance of the hearing based on a preplanned trip out of town with his wife. He had not known the dates of the trip when the additional hearings were scheduled, because his wife keeps his calendar. Pesqueira's attorney informed the board that Pesqueira would also be out of town during the hearing dates scheduled in May, because his son was graduating from college.

The LAPD objected to any continuance. The LAPD representative stated, "[W]e all sat down with our calendars and went through and set the five board dates. At that time everyone indicated their calendars were clear, including our witness, [whose] scheduling and . . . travel is problematic. [¶] So it is our contention that we would like to continue; however, before the board actually rules on that, per Board of Rights Manual Section 327, the Chief . . . may intervene when the appellant fails to show up." The LAPD representative recommended that the board make no ruling and requested a recess to discuss the matter with the Chief. Pesqueira's attorney objected to characterizing Pesqueira's absence as a refusal to appear. He reminded the board that Pesqueira had been prepared to proceed on a previously scheduled date, which was cancelled due to the

LAPD. He also noted that Pesqueira had agreed to the dates conditionally, stating that he needed to check with his wife. There is no evidence that the LAPD had its witness present to continue cross-examination.

After speaking with the Chief, the LAPD representative informed the board that the Chief directed the penalty of demotion be imposed without a hearing under the authority of Los Angeles City Charter section 1070, subsection (i) (Charter). Pesqueira's attorney stated that he had authority from his client to proceed with the hearing in his absence. However, the board followed the decision of the Chief and adjourned the hearing.

Pesqueira filed a petition for peremptory writ of mandate on July 10, 2008. On October 27, 2008, a trial setting conference was held and the parties stipulated to a briefing schedule. Pesqueira filed the operative amended petition with a memorandum of points and authorities on April 20, 2009, seeking to have the demotion vacated under section 1094.5 and his grievance granted under section 1085. He did not file a notice of motion with the amended petition. The City objected to Pesqueira's failure to comply with the requirements of a noticed motion under California Rules of Court, rule 3.1110. The City opposed the petition on several grounds, including that the petition lacked a notice of motion.

A hearing was held on June 15, 2009. The trial court found that a notice of motion was unnecessary because the court had set a briefing schedule on the petition's claims. The court concluded that the board made no finding as to whether Pesqueira's failure to appear at the hearing was without reasonable excuse. Instead, the Chief took the matter from the board and interpreted Charter section 1070, subsection (i) as providing him authority, when an accused fails to appear without good cause, to direct the board to proceed or impose the penalty without a hearing.

The trial court concluded that the Chief impliedly found Pesqueira's absence lacked reasonable excuse, because he chose to impose the demotion. However, the court found Pesqueira had a reasonable excuse for not appearing. When the additional hearing dates were selected, Pesqueira had advised that he might not be available on one of the

dates, but would confirm it as soon as he could. He notified the LAPD on April 7, 2008, that he in fact had a conflict and requested a continuance. Pesqueira's attorney explained the circumstances to the board. There was no evidence as to why Pesqueira did not have information about his schedule with him on the first hearing date.

The trial court also found that the Chief's implied decision that Pesqueira did not have a reasonable excuse for his absence was not supported by substantial evidence. Pesqueira had informed the parties of a potential conflict and notified the LAPD a week before the hearing that he would not be available. The LAPD's knowledge was demonstrated by the fact that it did not have its witness present. "In short, it is obvious that the Chief seized upon Pesqueira's failure to appear as a reason to impose the demotion without a hearing. He cannot do so under Charter section 1070[, subsection] (i).)" The court found that the Chief abused his discretion by rejecting Pesqueira's request for a continuance and imposing the demotion without a hearing because there was no substantial evidence in the record to support this finding.

On July 16, 2009, the trial court entered a judgment granting the petition as to the demotion, vacating the Chief's decision, and remanding the matter to the board to complete the administrative hearing or take other action consistent with the ruling. The court denied the petition as to the grievance. The City filed a timely notice of appeal.

DISCUSSION

Applicable Charter Provisions

The Charter contains rights and procedures for the discipline of tenured police officers. Charter section 1070, subsection (a), provides that a member's rights to hold his or her position and receive compensation for the position is a substantial property right. "No member shall be . . . demoted in rank . . . except for good and sufficient cause shown upon a finding of guilty of the specific charge or charges assigned as cause or causes after

a full, fair, and impartial hearing before a Board of Rights, except as provided in subsections (b) and (i).” (Charter, § 1070, subsection (a).)

After following predisciplinary procedures, the Chief may demote a member in rank, subject to the officer’s right to request a hearing by a board of rights to review the charges. (Charter, § 1070, subsection (b)(4).) A board of rights hearing is a de novo evidentiary hearing at which the LAPD has the burden of proving each charge. (Charter, § 1070, subsections (f), (l).) Upon a finding of guilt the board of rights recommends discipline, including suspension, demotion, reprimand or removal. (Charter, § 1070, subsection (n).) The Chief may accept the penalty recommendation of the board of rights or impose a lesser penalty, but may not increase the penalty. (Charter, § 1070, subsection (p).)

Charter section 1070, subsection (i), provides that, “If a Board of Rights has been constituted for the purpose of hearing and the accused, without reasonable excuse, fails or refuses to appear before the Board at the time and place designated, the Chief of Police may, at his or her discretion, either direct the Board of Rights to proceed with the hearing in the absence of the accused, or the Chief may, without a hearing, impose a penalty of suspension, demotion in rank, suspension and demotion in rank, or removal as he or she deems fit and proper. The Chief shall cause notice of the action to be served upon the member and shall file a statement of the action with the Board of Police Commissioners within five days.”

Nature of the Mandamus Proceeding

The City contends that under the circumstances of this case, Pesqueira was not entitled to a hearing, and therefore, the Chief’s final administrative decision is reviewable under the standards of traditional mandamus under section 1085, rather than the standards for administrative mandamus under section 1094.5. This is incorrect.

“Section 1094.5 . . . provides the basic framework by which an aggrieved party to an administrative proceeding may seek judicial review of any final order or decision

rendered by a state or local agency.” (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 137 (*Bixby*), fn. omitted.) Section 1094.5, subdivision (a) applies to review “any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer[.]”

It is well-settled that the validity of a final administrative decision of a public entity employer, including the LAPD, is reviewable by a petition for administrative mandamus under section 1094.5. (See *Gales v. Superior Court* (1996) 47 Cal.App.4th 1596, 1603 [holding Pasadena police officer was required to file mandamus petition pursuant to § 1094.5 to challenge final administrative decision to demote him]; *Moore v. City of Los Angeles* (2007) 156 Cal.App.4th 373, 382.)

Pesqueira sought to appeal the administrative finding that he had no reasonable excuse for failing to appear before the board at the time and place designated for the hearing. If Pesqueira’s excuse was reasonable, Pesqueira was entitled to a hearing. The City’s interpretation of the Charter provisions is illogical, namely that an administrative finding that the officer’s failure to appear is unreasonable, which permits the Chief to deprive the officer of the right to a hearing, is subject to lower standards of review than finding the excuse was reasonable and providing a hearing. Pesqueira’s writ petition was properly treated as a petition for administrative mandamus under section 1094.5.

Standard of Review

The City contends this court should review the administrative record for substantial evidence to support the administrative decision. This is incorrect.

Section 1094.5, subdivision (c), provides: “Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In

all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.”

“If the decision of an administrative agency will substantially effect [a fundamental vested right], the trial court not only examines the administrative record for errors of law but also exercises its independent judgment upon the evidence disclosed in a limited trial de novo.” (*Bixby, supra*, 4 Cal.3d at p.143, fn. omitted.) “If the administrative decision does not involve, or substantially affect, any fundamental vested right, the trial court must still review the entire administrative record to determine whether the findings are supported by substantial evidence and whether the agency committed any errors of law, but the trial court need not look beyond that whole record of the administrative proceedings.” (*Id.* at p. 144, fn. omitted.)

“The courts must decide on a case-by-case basis whether an administrative decision or class of decisions substantially affects fundamental vested rights and thus requires independent judgment review. [Citations.] As we shall explain, the courts in this case-by-case analysis consider the nature of the right of the individual: whether it is a fundamental and basic one, which will suffer substantial interference by the action of the administrative agency, and, if it is such a fundamental right, whether it is possessed by, and vested in, the individual or merely sought by him.” (*Bixby, supra*, 4 Cal.3d at p. 144.)

A tenured peace officer’s right to employment is vested and fundamental. (*Wences v. City of Los Angeles* (2009) 177 Cal.App.4th 305, 316 (*Wences*).) The demotion in this case substantially affected Pesqueira’s fundamental vested right to his employment, and therefore, the independent judgment standard of review was appropriate. (Cf. *Ibid.* [trial court was required to exercise independent judgment because administrative decision upholding written reprimand substantially affected peace officer’s fundamental vested right in his employment].)

“[O]n appeal from a judgment in a case where the trial court is required to exercise its independent judgment, our review of the record is limited to a determination whether substantial evidence supports the trial court's conclusions and, in making that

determination, we must resolve all conflicts and indulge all reasonable inferences in favor of the party who prevailed in the trial court. [Citations.]” (*Barber v. Long Beach Civil Service Com.* (1996) 45 Cal.App.4th 652, 659 -660.)

The trial court found Pesqueira’s excuse for failing to appear at the hearing was reasonable. There is substantial evidence to support this finding in the record. Pesqueira informed the board and the LAPD that he might have a conflict with one of the dates. When he confirmed that he had a scheduling conflict, he informed the LAPD and requested a continuance. Pesqueira’s attorney appeared on his behalf at the hearing on April 14, 2008, and was prepared to continue with the hearing, if necessary. The court’s finding that Pesqueira’s excuse was reasonable is supported by substantial evidence.

Notice of Motion

The City contends that the trial court erred by allowing Pesqueira to proceed without serving and filing a notice of motion. Specifically, Pesqueira did not file a notice of motion as required under California Rules of Court, rule 3.1110. Therefore, the City contends the amended petition should have been denied. We disagree.

Section 1088 provides that a party may apply for a writ of mandate by application to the trial court without notice to the adverse party, and if granted, an alternative writ must be issued, or an application upon due notice, which if granted, a peremptory writ may be issued.

However, section 475 provides: “The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such

error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown.”

In this case, the trial court found the case management hearing, setting the briefing schedule for the parties, rendered the notice of motion unnecessary. On appeal, the City has not identified any prejudice that it has suffered as a result of the lack of a notice of motion.

DISPOSITION

The judgment is affirmed. Respondent Paul Pesqueira is awarded his costs on appeal.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.